IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1059

PUGET SOUND BULB EXCHANGE, a marketing cooperative,
Plaintiff,
v.
METAL BUILDINGS INSULATION, INC., a corporation; PERROTT KAUFMAN STEEL BUILDING COMPANY, INC., a corporation; STRAN-STEEL CORPORATION, a corporation; and NATIONAL STEEL CORPORATION, a corporation,
Defendants,
and
METAL BUILDINGS INSULATION, INC., a corporation,
Respondent,
v.
HAMILTON MANUFACTURING COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

HAROLD E. WINTHER of
COMBS & SMALL
Counsel for Petitioner

Office and Post Office Address:
923 South K Street
P.O. Box 5126
Tacoma, Washington 98405
Telephone: (206) 383-5861

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

INDEX

Page

Opinions Below 2

Jurisdiction 2

Question Presented 2

Constitutional and Statutory Provisions Involved 2

Statement of the Case 3

Argument and Supportive Law Favoring Review By Writ of Certiorari 6

Conclusion 10

Appendices:

Appendix A—Opinion, Court of Appeals Division II July 12, 1973 (No. 774-II) A-1

Appendix B—Order denying petition for rehearing August 20, 1973 (No. 774-II) A-13

Appendix C—Order denying petition for review October 9, 1973 (No. 42945) A-14

Appendiv D—Oral opinion of trial court August 16, 1972 (No. 201329) A-15

TABLES OF AUTHORITY

Table of Cases

Hanson v. Denckla, 357 U.S. 325, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958) 9, 10

International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945) 9

Constitutional Provisions

United States Constitution, Amendment XIV 2-3

Statutes

RCW 4.28.185(1) 2, 3, 4

28 U.S.C. §1257(3) 2

IN THE

Supreme Court of the United States

October Term, 1973

No. .....

PUGET SOUND BULB EXCHANGE, a marketing cooperative,
Plaintiff,

v.

METAL BUILDINGS INSULATION, INC., a corporation; PERROTT KAUFMAN STEEL BUILDING COMPANY, INC., a corporation; STRAN-STEEL CORPORATION, a corporation; and NATIONAL STEEL CORPORATION, a corporation,
Defendants,

and

METAL BUILDINGS INSULATION, INC., a corporation,
Respondent,

v.

HAMILTON MANUFACTURING COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner, Hamilton Manufacturing Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Washington, Division II, entered July 12, 1973, and finalized by order of the Supreme Court of the State of Washington on October 9, 1973, reversing and remanding for further proceedings the judgment of the Superior Court of the State of Washington, in and for the County of Pierce, and that on hearing such judgment of the court of appeals be vacated, set aside, and

reversed, with instructions to reinstate the judgment of the superior court.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Washington, reversing the judgment of the superior court, appearing as *Puget Sound Bulb Exchange v. Metal Buildings Insulation, Inc., (Appellant), Hamilton Manufacturing Company (Respondent),* is reported in 9 Wn. App. 284, 513 P.2d 102 (1973), *petition denied* 82 Wn.2d 1013 (1973).

JURISDICTION

The decision and judgment of the Court of Appeals of the State of Washington was entered on July 12, 1973. Appendix "A," *infra.* Timely petition for rehearing was filed, and was denied on August 20, 1973. Appendix "B," *infra.* Timely petition for review to the Supreme Court of the State of Washington was filed, and was denied on October 9, 1973. Appendix "C," *infra.* The United States Supreme Court has jurisdiction under 28 U.S.C. §1257(3).

QUESTION PRESENTED

1. Whether the assumption of *in personam* jurisdiction over Petitioner, a non-resident, by the courts of the state of Washington under its long-arm statute [RCW 4.28.185 (1)], offended the minimal due process standards of the United States Constitution, Amendment Fourteen.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The instant petition centers on the *in personam* jurisdictional application of the due process clause of the four-

teenth amendment, United States Constitution:

> "... nor shall any State deprive any person of ... property, without due process of law" • • •

2. Secondly, the constitutional validity of Washington's long-arm statute, RCW 4.28.185(1), as construed, is in issue:

> "(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> "(a) The transaction of any business within this state;
>
> "(b) The commission of a tortious act within this state;" • • •

STATEMENT OF THE CASE

By complaint filed on February 17, 1971, under Pierce County Superior Court Cause No. 201329, Puget Sound Bulb Exchange brought an action against several named defendants, including Metal Buildings Insulation, Inc. [hereinafter referred to as "Respondent"], alleging generally the sustenance of $125,000 in property damage from allegedly defective insulating materials used in its metal building. Eventually, Respondent, the self-acclaimed and accorded, at least by its several defendant colleagues, insulation expert conceived a shift of its own exposure to the manufacturer of a "craft paper" [sic] used as a facing for its product. In furtherance thereof, Respondent moved and, on August 16, 1971, was granted permission to file a third party complaint against its supplier, Hamilton Manufacturing Company [hereinafter referred to as "Petitioner"]. Such complaint was thereafter caused to be served upon

Petitioner in Richmond, Virginia. Petitioner's introduction to the state of Washington came through its postal apprisement of the impending litigation, confirmation of which occurred several days later on bestowal of the summons and third-party complaint. Personal jurisdiction over Petitioner was assumed under RCW 4.28.185, Washington's long-arm statute.

Notwithstanding the skepticism attending Petitioner's desire to become involved in cross-country litigation, a formal notice of appearance was eventually put in on January 20, 1972. Several weeks later, contemporaneously with the filing of its answer and affirmative defenses, Petitioner moved for dismissal on various grounds, including the court's lack of *in personam* jurisdiction. Following presentment of affidavits and legal memoranda, argument on the motion was heard a scant three days before the trial was scheduled to commence. When all was said and done, the judge pronounced:

> "Based upon what I have before me I will conclude as a matter or law that the defendant Hamilton Manufacturing Company must be dismissed for lack of jurisdiction of this court." Appendix "D," at 42, lines 23-26

The order summarily dismissing Petitioner was entered on March 2, 1972. Timely appeal thereof was taken to the Court of Appeals of the State of Washington. At the outset, the court endeavored to separate what it determined to be of legislative origin, though judicially perfected, from the rather illusory constitutional standard:

> "[T]here are three basic factors which must coincide if jurisdiction is to be entertained. Such would appear to be: (1) The nonresident defendant or foreign corporation must purposefully do some act or consum-

mate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum sate must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation.' (Footnotes omitted.)

"The first factor outlines the statutory requirements of RCW 4.28.185(1)(a) and (b). The second factor expresses the limitations set forth in RCW 4.28.185 (1) and (3) that the cause of action must arise from, or be connected with, the act or transaction purposefully performed or consummated in this state. The third factor does not arise from the statute at all. It expresses the due process limitation that the imposition of jurisdiction over the person of a nonresident defendant must not offend traditional notions of fair play and substantial justice." Appendix "A," at 7 [9 Wn. App. at 290-91]

Notwithstanding its express recognition "that Metal Buildings [Respondent] has not shown sufficient minimum contacts between Hamilton [Petitioner] and this state" (Appendix "A," at 9) [9 Wn. App. at 292], the court maintained its segregatory analysis and, purely because Petitioner inferentially was aware of Respondent's interstate activities, determined that the maintenance of *in personam* jurisdiction over Petitioner by the courts of Washington would not offend traditional notions of fair play and substantial justice. Appendix "A" at 11 [9 Wn. App. at 294]. Reversal and remand was accomplished on July 12, 1973. Petitioner's petition for rehearing was denied on August 20, 1973 and the Supreme Court of the State of Washington denied Petitioner's petition for review on October 9, 1973. Petitioner

seeks review of the record and decision of the Court of Appeals of the State of Washington, and to have the judgment of reversal vacated, set aside, and reversed, with direction to reinstate the order of the trial court, effecting jurisdictional dismissal.

ARGUMENT AND SUPPORTIVE LAW FAVORING REVIEW BY WRIT OF CERTIORARI

The more meritorius aspect of the action from which the instant petition is taken derives from a contract or agreement entered into on March 23, 1966, calling for the construction of a metal building within which the plaintiff's stock in trade and offices could be housed. Not surprisingly, Respondent was designated the insulation specialist and assigned the role of satisfying the requirements therein prescribed. Whatever the contributive expertise, some four or five years following completion the roof of the structure became severely corroded and rusted, causing the contents therein to be climatically exposed. The resultant damage was attributed to "the water-attracting, water-holding, and corrosion inducing qualities of the insulation and glue tabs installed in plaintiff's building, which insulation and glue tabs were manufactured by defendant Metal Buildings Insulation, Inc. . . .". Admitting its own involvement in the manufacture and sale of the insulating materials embodied in the metal structure, Respondent solicited to have Petitioner, a Virginia corporation, become its local indemnitor.

The damaged building, it should be noted, is situate in the county of Pierce, state of Washington; all of the negotiations, discussions and business dealings, including any written manifestations thereof, between the initial liti-

gants appertaining to the design and construction of the building centered within the border of Washington. The record is devoid of any evidence suggesting Petitioner's participation in or awareness of the events surrounding the construction of the metal building in a geographically remote sector of the country. But, because Petitioner had had some business dealings with one of the participants therein, Respondent, the long-arm statute was fancied the practical expedient to establish some sort of tie between Petitioner and the state of Washington.

Respondent is not presumed to have served as Petitioner's agent or national representative and, indeed, its own rather secretive interstate operations added nothing to the creation of any kind of vicarious relationship. Whatever Respondent's pleasure and convenience respecting litigation locale, Petitioner has never done or transacted any business within the state of Washington, nor has it in any way availed itself of the Washington market relative to the manufacture and sale of its products. The court of appeals recognized that Petitioner never sought authorization to transact business within the state, sent neither its products nor any of its agents or salesmen into the state, never solicited business within the state, and did not keep or maintain any office, personnel, advertising, telephone lists, goods or property in Washington. Appendix "A" at 9 [9 Wn. App. at 292]. Though hardly touching on its manufacturing and selling activities in 1966 [when sale of petitioner's product necessarily occurred] and the years prior thereto, Petitioner does admit to its contemporaneous involvement with various suppliers and customers doing business principally, if not exclusively, in states easterly located. Curiously, while a good deal of emphasis was

placed on Petitioner's foreign involvement, no mention whatsoever has ever been made that Petitioner had even remote "contact" with the very state urged to have jurisdiction over such involvement.

The more direct dealings between Respondent and Petitioner likewise were confined to places distant from Washington. It is uncontroverted that the transactions, past and present, including solicitations, negotiations, agreements and the like, between Respondents and Petitioner were entirely concentrated in the states of Ohio and Virginia. Imaginatively, the entire effort to associate Petitioner with the state of Washington stems not from its own pursuits within the state, but from its purported knowledge that one of its customers had become a Washington business venturer. Promulgation of such an osmotic tie coincidentally traces to the real Washington activist . . . the Respondent. The jurisdictional base, however theoretically sparse, is further undermined by the record itself when an effort is made to correlate in terms of time the averred awareness or knowledge of Petitioner with the creation of the local structure. At no time prior to November, 1967, did Respondent bestow upon Petitioner information respecting its internal operations and it is indeed presumptuous to infer from the record that Petitioner, in 1966, knew or should have known that Respondent's operations in 1965 and 1966 had reached national or international scale. The whole of Respondent's solicitous endeavor bespeaks simply of its own contacts with the state of Washington, and no more.

The within petition is founded upon fourteenth amendment due process, and rests essentially upon two cases—

International Shoe Co. v. Washington, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R 1057 (1945), and *Hanson v. Denckla*, 357 U.S. 325, 2 L.Ed.2d 1283, 78 S. Ct. 1228 (1958). Most long-arm statutes, including the one under which Petitioner has been subjected to the *in personam* jurisdiction of the Washington courts, derive from the aforementioned decisions. However inartfully drafted, the constitutional validity of such statutes seemingly hinges on whether the non-resident defendant has had sufficient contacts with the forum state so that the maintenance of a suit does not offend "traditional notions of fair play and substantial justice."

In other words, the courts of a given state simply are without power to assume personal jurisdiction over a non-resident who has not engaged in any purposeful act or conduct within its boundaries or otherwise sought the benefits and protections of its laws. Notwithstanding the decision of the court of appeals, it is Petitioner's view that its dealings with Respondent, conducted entirely without the state, afforded the Washington courts no jurisdictional basis whatsoever within the constitutional framework. The following appears in *International Shoe Co. v. Washington, supra:*

> "Whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure. That clause does not contemplate that a state may make binding a judgment *in personam* against an individual or corporate defendant with which the state has no contacts, ties, or relations." 326 U.S. at 319

And of particular moment is the cautionary admonition

found in *Hanson v. Denckla, supra,* appertaining to a supposedly liberal jurisdictional trend:

> "[I]t is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. . . . Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states. *However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that state that are prerequisite to its exercise of power over him.*
>
> "• • •
>
> "*The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state.* The application of that rule will vary with the quality and nature of the defendant's activity, *but it is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. . . .*" (Emphasis added.) 357 U.S. at 251, 253.

CONCLUSION

The unilateral activity of Respondent, under the constitutional criteria, hardly appears sufficient to satisfy the "minimal contact" mandate of the United States Supreme Court. Deferentially, Petitioner urges that the within writ be granted.

Respectfully submitted,

HAROLD E. WINTHER of
COMBS & SMALL
Counsel for Petitioner

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUGET SOUND BULB EXCHANGE, a marketing corporation, *Plaintiff*, v. METAL BUILDINGS INSULATION, INC., a corporation, *Appellant*, PERROT KAUFMAN STEEL BUILDING COMPANY, INC., a corporation; STRAN-STEEL CORPORATION, a corporation; and NATIONAL STEEL CORPORATION, a corporation, *Defendants*, and HAMILTON MANUFACTURING COMPANY, *Respondent and Cross-Appellant*.	No. 774-II Division II
	Filed July 12, 1973

ARMSTRONG, J.—Metal Buildings Insulation, Inc., has appealed from a judgment entered against it in a suit alleging defective installation of insulation. The appeal attacks an order dismissing Hamilton Manufacturing Company, a third party defendant and the manufacturer of the allegedly defective insulation.

One of the defendants, not a party to this appeal, constructed a building for the plaintiff, Puget Sound Bulb Exchange. Metal Buildings supplied the insulation. The room leaked almost immediately and plaintiff brought suit

contending that the insulation was defective, resulting in water damage to its inventory.

The suit was tried to the court and it found that the insulation supplied by Metal Buildings was defective, that the plaintiff-owner of the building had not anticipated the use of a defective product and that the defective insulation should not have been recommended or supplied by any of the defendants. Accordingly, the court granted the plaintiff judgment for $96,062.30 damages caused by the defective insulation plus costs against all four defendants. The judgment also required Metal Buildings to indemnify the other three defendants. Metal Buildings has satisfied that judgment and is the sole appellant.

Before trial, Metal Buildings filed a third party complaint against Hamilton Manufacturing Company, the manufacturer of the allegedly defective insulation. Hamilton is a Virginia corporation not authorized to transact business in this state. Hamilton moved to dismiss the third party complaint for lack of personal jurisdiction over it. The court held a hearing on the motion and dismissed the third party complaint without prejudice. Metal Buildings did not appeal within 30 days from this order. It has appealed from the final judgment in the suit and specifically complains, in its notice of appeal, of the order dismissing Hamilton.

The issues we must decide are: (1) does an appeal from the final judgment in the suit bring up for review the order dismissing the third party complaint, and if so, (2) did the trial court properly dismiss the third party complaint for lack of *in personam* jurisdiction over Hamilton? We hold

that the order of dismissal is properly before us and that the trial court erred in granting the dismissal.

Hamilton raises the first issue pursuant to CAROA 51 which allows a respondent to move to dismiss an appeal on any of several grounds. Hamilton contends that the failure of Metal Buildings to appeal within 30 days from the order of dismissal deprives this court of jurisdiction to consider the propriety of that order. We disagree.

The order dismissing Hamilton was entered on March 2, 1972. The final judgment in the suit was entered on April 7, 1972. Within 30 days of the final judgment, on May 3, 1972, Metal Buildings filed its notice of appeal.

CAROA 14 describes which judgments and orders are appealable. Subdivision (1) provides that the final judgment in any action or proceeding is appealable and that "An appeal from any such final judgment shall also bring up for review any order made in the same action or proceeding either before or after the judgment."

Hamilton contends that the order of dismissal was a final judgment because it determines with finality the rights of the parties to the third party complaint. Hamilton argues that CAROA 14(1) does not contemplate a part of the entire suit, because it effectively precluded further dispute on the merits respecting the affected parties. We cannot agree with this analysis because, in our view, the order of dismissal did not preclude further dispute on the merits.

The order dismissing Hamilton stated in relevant part:

> ORDERED, ADJUDGED AND DECREED that the third party complaint filed by Metal Buildings Insulation, Inc., against third party defendant, Hamilton Manufacturing Company, be dismissed without preju-

dice as this court lacks jurisdiction over the person of Hamilton Manufacturing Company.

CR 54(b) describes which orders or judgments shall be final when the suit involves multiple claims or multiple parties. It provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties *only upon an express determination in the judgment, that there is no just reason for delay and upon an express direction for the entry of judgment.* In the absence of such determination and direction, any order or other form of decision, however claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.
>
> (Italics ours.)

The order dismissing Hamilton did not contain an express determination that "there is no just reason for delay" or an express direction for the entry of judgment. It was therefore, subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties. It was not a final judgment and could not be appealed at that time. The order must be one which is brought up for review by an appeal from the final judgment. CAROA 14(1); *cf. Oliver v. American Motors Corp.*, 70 Wn.2d 875, 425 P.2d 647 (1967).

Before proceeding to the merits of the dismissal we must discuss two minor issues. First, Hamilton, as a third party defendant, is treated the same as any other non-

-resident defendant for purposes of RCW. 4.28.185. In *Deutsch v. West Coast Machinery Co.*, 80 Wn.2d 707, 497 P.2d 1311 (1972), the court held that our long arm statute does not discriminate between first and third party actions.

Second, in reviewing the property of this dismissal, we must view the facts in the light most favorable to the non-moving party. CR12(b), which authorizes a motion to dismiss for lack of jurisdiction over the person, does not specifically allow the trial court to consider matters outside the pleadings.[1] However, the purpose of the rules would be largely frustrated if the parties could not introduce matters outside the pleadings on such a motion. *See* 3A L. Orland, Wash. Prac. comment 2 at 16 (2d ed. 1968). CR 12(b) is identical to Fed. R. Civ. P. 12(b), 28 U.S.C.A. The portion of the rule which allows the parties to introduce extraneous matters in a motion to dismiss pursuant to CR 12(b) (6) is a 1946 amendment to Fed. R. Civ. P. 12(b),

1. CR 12(b) provides: "Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

28 U.S.C.A. Professor Moore, in his treatise on federal practice, states that the reason this particular amendment did not specifically include the authority to introduce extraneous matters in motions to dismiss on the grounds specified in Rule 12(b) (1-5) and (7) is that there never was any substantial doubt that the parties could introduce extraneous matters in these motions. 2A J. Moore, Federal Practice, § 12:09[3], 2297 (1972).

If matters outside the pleadings are presented to the court on a motion to dismiss for lack of personal jurisdiction under CR 12(b)(2) the motion is to be treated as a motion for summary judgment. Moore, Federal Practice, *supra*, at 2302; *see e.g. Ace Novelty Co. v. M. W. Kasch Co.*, 82 Wn.2d 145, 508 P.2d 1365 (1973); *Ryland v. Universal Oil Co.*, 8 Wn. App. 43, 504 P.2d 1171 (1972). Because matters outside the pleadings were presented and not excluded by the trial court in this case, we will treat the motion as one for summary judgment under CR 56. Accordingly, viewing the materials presented in the light most favorable to the nonmoving party, we will affirm the trial court only if it appears that Metal Buildings would not have been able to present a genuine issue of material fact before the trier of fact. *Preston v. Duncan*, 55 Wn.2d 678, 349 P.2d 605 (1960).

We proceed now to the merits of the dismissal. Metal Buildings contends that the state of Washington may assert personal jurisdiction over Hamilton, a Virginia corporation, pursuant to RCW 4.28.185,[2] our long arm statute.

2. RCW 4.28.185 provides in relevant part: "(1) Any person, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts in this section enumerated, thereby submits said person, and, if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:

Metal Buildings further contends that imposition of personal jurisdiction over Hamilton will not offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057 (1945). We agree.

In *Ace Novelty Co. v. M. W. Kasch Co., supra*, at 147, our Supreme Court reiterated its long standing rule announced in *Tyee Constr. Co. v. Dulien Steel Products, Inc.*, 62 Wn.2d 106, 115, 381 P.2d 245 (1963):

> [T]here are three basic factors which must coincide if jurisdiction is to be entertained. Such would appear to be: (1) The nonresident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature, and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws of the forum state afforded the respective parties, and the basic equities of the situation. (Footnotes omitted.)

The first factor outlines the statutory requirements of RCW 4.28.185(e)(a) and (b). The second factor expresses the limitations set forth in RCW 4.28.185(1) and (3) that the cause of action must arise from, or be con-

---

(a) The transaction of any business within this state;
(b) The commission of a tortious act within this state;
(c) The ownership, use, or possession of any property whether real or personal situated in this state;
(d) Contracting to insure any person, property or risk located within this state at the time of contracting.

• • •

(3) Only causes of action arising from acts enumerated herein may be asserted against a defendant in an action in which jurisdiction over him is based upon this section."

nected with, the act or transaction purposefully performed or consummated in this state. The third factor does not arise from the statute at all. It expresses the due process limitation that the imposition of jurisdiction over the person of a nonresident defendant must not offend traditional notions of fair play and substantial justice. *Smith* v. *York Food Machinery Co.*, 81 Wn.2d 719, 504 P.2d 782 (1972); *Callahan* v. *Keystone Fireworks Mfg. Co.*, 72 Wn.2d 823, 435 P.2d 626 (1967).

In the instant case Metal Buildings has attempted to assert jurisdiction over the person of Hamilton pursuant to RCW 4.28.185(1)(b), that Hamilton has committed a tortious act in this state. Thus, so far as the first two factors are concerned, it does not matter whether or not Hamilton has transacted business in this state. *Thiry* v. *Atlantic Monthly Co.*, 74 Wn.2d 679, 445 P.2d 1012 (1968). In a tortious act case the first two factors are satisfied whenever the person attempting to assert jurisdiction shows that the injury which is the subject of the suit occurred in this state and that it was caused by an act of the nonresident defendant outside this state. *Nixon* v. *Cohn*, 62 Wn.2d 987, 385 P.2d 305 (1963); *Smith* v. *York Food Machinery Co.*, *supra*. Whether the cause of the injury which occurred to Puget Sound Bulb Exchange in this state was defective manufacturing of the insulation by Hamilton has not been decided by the trier of the fact. Metal Buildings has, however, presented sufficient facts by affidavite and deposition to create a material issue of fact on the question. We must assume, therefore, that the first two factors are satisfied.

The third factor in the *Tyee* rule is the one most difficult

of application. Confusion in applying the rule exists because either one of two theories will satisfy the requirement. Courts may look to find the sufficient minimum contacts of *International Shoe Co. v. Washington, supra,* or they may determine that the non-resident defendant so placed its products in the broad stream of interstate commerce that assertion of jurisdiction over it will not offend traditional notions of fair play and substantial justice. Under this second theory the minimum contacts of *International Shoe* are inferred from the fact that the nonresident defendant knowingly places its product in the broad stream of interstate commerce. The manufacturer is charged with knowledge that such conduct may have consequences in another state. *Smith v. York Food Machinery Co., supra; Omstead v. Brader Heaters,* 5 Wn. App. 258, 487 P.2d 234 (1971), opinion of this court adopted as the opinion of the Supreme Court in 80 Wn.2d 720, 497 P.2d 1310 (1972);[3] see also *Deutsch v. West Coast Machinery Co., supra.*

We agree with counsel for Hamilton that Metal Buildings has not shown sufficient minimum contracts between Hamilton and this state to satisfy us that jurisdiction may be asserted under the first theory. Hamilton is a Virginia corporation and has never sought authorization to transact business in this state. The record is void of any business dealings directly between Hamilton and Washington residents. Hamilton has not sent any of its products nor any of its agents or salesmen into this state. It has never solicited business within this state, nor has it kept or main-

3. The international jurisdiction implications of *Omstead v. Brader Heaters,* 5 Wn. App. 258, 487 P.2d 234 (1971), are analyzed in a scholarly article entitled "Civil Procedure—Long Arm Statutes—Jurisdiction Over Alien Manufacturers in Products Liability Actions," 18 Wayne L. Rev. 1585 (1972). The article discusses *Omstead* as the principal case.

tained any office, personnel, advertising, telephone lists, goods or property in Washington.

Metal Buildings has shown that Hamilton is engaged in the manufacture and sale of laminated paper and foil products. Hamilton processes paper received from paper mills into more sophisticated form either by coating it with other materials, laminating other materials such as aluminum foil to it or by coating it with wax. It manufactures 5 basic products and does certain specialized laminations such as lamination of steel foil paper to paper for United States Steel and lamination of special plastic materials to plastic or paper for DuPont. Hamilton sells its products in at least 15 states and markets them with the aid of brochures, technical bulletins and direct mail pieces. Hamilton's customers either use these products themselves or sell them to their own customers and Hamilton is aware of this. Hamilton is also aware that, through this marketing chain, its products are used by such large and well known companies as American Can Company, Colonel Sanders Kentucky Fried Chicken, Banquet Foods, Nestles, Kraft Foods and Johns Manville. These users of its products, according to Hamilton's vice president of sales, change drastically from year to year. Since 1965 Hamilton's gross sales have increased steadily at the rate of 5 to 6 percent a year to about $7 million in 1972.

The specific product which was allegedly defective is foil-scrim kraft paper. Hamilton manufactures this product from aluminum foil, paper, adhesive and fiberglass scrim which is loosely woven fiberglass fabric. Most users of this product, Metal Buildings included, adhere the foilscrim kraft paper to a fiberglass bed and use it as insulating ma-

terial for buildings. Hamilton has been manufacturing it for 10 years and sells it to customers located in Indiana, Ohio, Pennsylvania, Missouri, Georgia and Virginia. Yearly sales of this product vary from $100,000 to $400,000. The particular foilscrim kraft paper used in the construction of the plaintiff's building in Pierce County was sold to Metal Buildings in Cleveland, Ohio in 1966.

During 1965 to 1967 the corporate president of Metal Buildings met with the vice prseident of sales for Hamilton and Hamilton's salesman in the Cleveland area several times. He discussed with both men the manner in which Metal Buildings uses failscrim kraft paper and that Metal Buildings distributes the product on a national basis. The front sheet of a promotional brochure used by Metal Buildings during 1965 and 1966 and supplied to both men relates that Metal Buildings, a specialist in metal building insulation, will deliver its products anywhere in the continental United States.[4]

It is clear that the particular sale of the foilscrim kraft paper to Metal Buildings in Cleveland by Hamilton, knowing that Metal Buildings distributed the product nationally, was not an isolated venture; it was but a small part of Hamilton's marketing practice. That practice was to avail itself of the vast market which could be reached through the broad stream of interstate commerce. Having voluntarily placed its product in the broad stream of interstate

4. In a deposition of the vice president of sales of Hamilton, the following occurred:

"Q. But actually, your product [foilscrim kraft paper] could be a part of some finished products that could really show up anyplace? [Objection]

• • •

A. That could be said of anything that anybody manufactures.

Q. And it could be said of yours?

A. Yes. It's improbable, but it could appear on the moon, I guess.

commerce, Hamilton is charged with knowledge that its product could appear in any state and therefore the necessary minimum contacts are inferred. Assertion of jurisdiction over the person of Hamilton does not, therefore, offend traditional notions of fair play and substantial justice. *Omstead v. Brader Heaters, supra; Smith v. York Food Machinery Co., supra.*

Because of our disposition of this appeal we do not reach the question raised by the cross-appeal.

The order of dismissal is reversed and the cause remanded for further proceedings consistent with this opinion.

/s/ PEARSON, C. J.

/s/ ARMSTRONG, J.
/s/ PETRIE, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PUGET SOUND BULB EXCHANGE, a marketing corporation,
Plaintiff,

v.

METAL BUILDINGS INSULATION, INC., a corporation,
Appellant,

PERROT KAUFMAN STEEL BUILDING COMPANY, INC., et al,
Defendants,

and

HAMILTON MANUFACTURING COMPANY,
Respondent and Cross-Appellant.

No. 774-II

ORDER DENYING PETITION FOR REHEARING

[Filed, Court of Appeals Division II '73 Aug. 20 p.m. 3:10
By /s/LARRY P. GILL *Clerk*]

The court has considered the petition for rehearing filed in this appeal and has determined that it should be denied. Accordingly, it is

ORDERED that this petition is denied.

DATED this 20th day of August, 1973.

/s/ VERNON R. PEARSON
Chief Judge

APPENDIX C

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

PUGET SOUND BULB EXCHANGE,
Plaintiff,

v.

METAL BUILDINGS INSULATION, INC.,
Respondent,

HAMILTON MANUFACTURING COMPANY,
Petitioner.

No. 42945
Department
(774-II)
ORDER
DENYING
PETITION
FOR REVIEW
[Filed Supreme
Court of
Washington '73
Oct. 9 P.M. 1:53
By /s/William P.
Lowry by Deputy
Clerk]

The Court having considered the petition for review of the decision of the Court of Appeals in this cause together with the answer thereto,

It is ordered that the petition be and it is hereby denied.

Dated this 9th day of October, 1973.

By the Court:

/s/ FRANK HALE
Chief Justice

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

PUGET SOUND BULB EXCHANGE,
a marketing cooperative,
Plaintiff,
v.
METAL BUILDINGS INSULATION, INC.,
a corporation;
PERROTT KAUFMAN STEEL BUILDING
COMPANY, INC., a corporation;
STRAN-STEEL CORPORATION,
a corporation; and
NATIONAL STEEL CORPORATION,
a corporation,
Defendants,
and
METAL BUILDINGS INSULATION, INC.,
a corporation,
Third Party Plaintiff,
v.
HAMILTON MANUFACTURING
COMPANY,
Third Party Defendant.

No. 201329

Statement
of Facts

APPENDIX D

THE COURT: Well, I certainly appreciate the extent to which Counsel have briefed this matter and presented the problems involved to me. I certainly am in favor of the resolution of all issues in one trial, but I certainly also recognize that there are standards of due process in the law that still exist. Based upon what I have before me I will conclude as a matter of law that the defendant Hamilton Manufactuuring Company must be dismissed for lack of jurisdiction of this court. However, I dismiss without prejudice because I don't think that's proper. Now, I want to refer to the Omstead case for two reasons: number one, because it does quote from the Tyee Construction Case, which sets down three specific things to consider in

ruling upon this question. "(1) The non-resident defendant or foreign corporation must purposely do some act or consummate some transaction in the forum state;". And I hold that the Hamilton Manufacturing Company has not done that. I will skip (2). "(3) The assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state," and I hold that it would offend traditional notions of fair play and substantial justice under the terms of that division of the Tyee case. I think it is interesting that Judge Armstrong, in writing this opinion, also set forth three things that he thought any judge or court should consider in ruling upon this question, and they are found at Page 270 where he says, "If a foreign manufacturer places his product in international trade, either directly or through use of intermediaries, it must be foreseeable that the product is destined to be placed in the broad stream of commerce in the United States, or sent to the forum state." The Hamilton Manufacturing Company does not come, in my opinion, within that guideline. "(2) The court should consider the extent of multistate business engaged in by the foreign manufacturer in this country, either directly or through intermediaries, and the benefits it receives. The court should then balance this against the extent or lack of multistate activity engaged in by the plaintiff." And I considered that in my ruling today. "(3) The court should balance the relative convenience and burdens placed upon both the plaintiff and the defendant by reason of litigating the cause of action in this state," and I considered that. Now, again, I do think there is a slight difference in this case, it being a third party defendant as opposed to a type of case in which a plaintiff is directly suing a foreign corporation. For that reason the Hamilton Manufacturing Company will be dismissed.

SUPREME COURT, U. S.

JAN 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1059

HAMILTON MANUFACTURING COMPANY,
Petitioner,
v.
METAL BUILDINGS INSULATION, INC.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM R. HICKMAN of
REED, MCCLURE, MOCERI
& THONN, P.S.
Counsel for Respondent

REED, MCCLURE, MOCERI & THONN, P.S.
17th Floor, Hoge Building
Seattle, Washington 98104
(206) 682-2444

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

SUBJECT INDEX

	Page
Brief In Opposition To Petition For Writ Of Certiorari	1
Nature of the Case	1
Resume of Pleadings and Proceedings	1
Argument Of Counsel	2
I. Since No "Final Judgment" Has Been Rendered Herein This Court Does Not Have Jurisdiction to Hear This Matter	2
II. The Decision in Question Herein Conforms to a Multitude of State and Federal Court Decisions and Is in Accord With the Decisions of This Court	5
Conclusion	10

TABLES OF AUTHORITY

Table of Cases

Arnold v. United States of America, for the use of W. B. Guimarin & Co., 263 U.S. 427 (1923) 3

Benn v. Linden Crane Co., 326 Fed.Supp. 995 (E.D. Pa. 1971) 6, 7

Blum v. Kawaguchi Ltd., 331 Fed.Supp. 216 (D. Neb. 1971) 6

County of St. Clair v. Lovingston, 85 U.S. 628 (1873) 4

Deutsch v. West Coast Manufacturing Co., 80 Wn.2d 707, 497 P.2d 1311 (1972), *cert. den'd*, 409 U.S. 1009 6

Georgia Railway & Power Co. v. Town of Decatur, 262 U.S. 432 (1922) 4

Golden Gate Hop Ranch, Inc. v. Velsico Chemical Co., 66 Wn.2d 469, 409 P.2d 351 (1965) 6

Gorso v. Bell Equipment Corp., 330 Fed.Supp. 934 (W.D. Pa. 1971) 6

Page

Griffiths & Sprague Stevedoring Co. v. Bailey, Martin & Fay, Inc., 71 Wn.2d 679, 430 P.2d 600 (1967).....7-8

Hanson v. Denckla, 357 U.S. 235 (1958).....8-9

International Shoe Co. v. Washington, 326 U.S. 310 (1945)..... 8

Keckler v. Brookwood Country Club, 248 Fed.Supp. 645 (N.D. Ill. 1965)..... 7

Liberty Mutual Ins. Co. v. American Pecco Corp., 334 Fed.Supp. 522 (D. D.C. 1971)..... 6

Moore v. Robbins, 85 U.S. 580 (1873)..... 4

Omstead v. Braden Heaters, Inc., 80 Wn.2d 720, 497 P.2d 1310 (1972)..... 6

Pope v. Atlantic Coastlines R.R., 345 U.S. 379 (1952).... 3

Scafati v. Bayerische Motoren Werke A.G., 53 F.R.D. 256 (W.D. Pa. 1971)..... 6

Statutes

28 U.S.C. §1257(3).....2-3

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1059

HAMILTON MANUFACTURING COMPANY,
Petitioner,

v.

METAL BUILDINGS INSULATION, INC.
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nature of the Case

This is an indemnity action arising out of a tort case whereby Respondent, Metal Buildings Insulation, Inc., (hereinafter referred to as MBI), seeks to recover indemnity from Petitioner, Hamilton Manufacturing Company, (hereinafter referred to as Hamilton).

Resume of Pleadings and Proceedings

Respondent MBI was one of three defendants in a suit filed in Pierce County, Washington by Puget Sound Bulb Exchange. Therein recovery was sought for damages allegedly incurred relative to a building constructed for the plaintiff in which MBI insulation was used.

MBI in turn filed a third party complaint against its supplier, Petitioner-Hamilton. In the complaint MBI alleged it was being sued because of damage which was caused by the water retention qualities of certain chemicals present in the Kraft paper which Hamilton had sold it, and that the permeability qualities of the Kraft paper were deficient.

Hamilton appeared and filed an answer. It also moved for a dismissal for lack of jurisdiction. The motion was heard on the basis of four affidavits and one deposition. The Superior Court dismissed Hamilton as a third party defendant.

The trial proceeded and ultimately MBI was held liable to plaintiff for $96,062.30 and to the co-defendants for the co-defendants' attorneys' fees.

MBI then took an appeal to the Court of Appeals of the State of Washington seeking to have the question of jurisdiction reviewed. The Court of Appeals heard the matter and reversed the dismissal stating:

> The order of dismissal is reversed and the cause remanded for further proceedings consistent with this opinion.

Subsequently, Hamilton sought a rehearing which was denied. Hamilton also sought review by the Washington Supreme Court and this was likewise denied.

ARGUMENT OF COUNSEL

I. Since No "Final Judgment" Has Been Rendered Herein This Court Does Not Have Jurisdiction to Hear This Matter

Hamilton premises alleged jurisdiction on 28 U.S.C. §1257(3). In pertinent part it provides:

> Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . .
>
> (3) By writ of certiorari, . . . where the validity of a state's statute is drawn in question on the ground of it being repugnant to the Constitution . . . of the United States. . . .

We find a discussion of the statute in *Pope v. Atlantic Coastlines R.R.*, 345 U.S. 379, 381 (1952):

> The statute which vests us with jurisdiction to review the decisions of state courts provides that the judgment must come from the 'highest court of a state in which a decision could be had,' and must be 'final.' 28 U.S.C. §1257. The case at bar clearly met the first requirement, but we were in doubt as to whether it satisfied the second.
>
> Congress has limited our power to review judgments from state courts lest the court's jurisdiction be exercised in piecemeal proceedings to render advisory opinions. Were our reviewing power not limited to 'final' judgments, litigants would be free to come here and seek a decision on federal questions which, after later proceedings, might subsequently prove to be unnecessary and irrelevant to a complete disposition of the litigation. Ordinarily, then, the overruling of a demurrer, like the issuance of a temporary injunction, is not a 'final' judgment.

We may also note *Arnold v. United States of America, for the use of W. B. Guimarin & Co.*, 263 U.S. 427, 434 (1923):

> It is well settled that a case may not be brought here by writ of error or appeal in fragments; that to be reviewable a judgment or decree must be not only final, but complete; that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved; and that if the judgment or decree be not thus final and complete, the writ of error or appeal must be dismissed for want of jurisdiction.

Georgia Railway & Power Co. v. Town of Decatur, 262 U.S. 432, 437 (1922):

> . . . The rule is established that, in order to give this court appellate jurisdiction, the judgment or decree 'must terminate the litigation between the parties on the merits of the case, so that, if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.'

County of St. Clair v. Lovingston, 85 U.S. 628 (1873) following *Moore v. Robbins*, 85 U.S. 580 (1873) stated:

> No judgment is final which does not terminate the litigation between the parties to the suit. From the record brought up to us it appears that the Supreme Court reversed the judgment which had been obtained in the Circuit Court and remanded the cause for such other and further proceedings as to law and justice shall appertain. The issue between the parties may be again tried in the Circuit Court, and another judgment may be recovered which may be removed to the Supreme Court for revision. Consequently, then, there has been no final determination of the case.

The decision which Hamilton wishes to have this court review is not a final decision. It is a decision of the Washington Court of Appeals in which that court ordered *"the cause remanded for further proceedings consistent with this opinion."* What further proceedings? In order to ascertain that we must review what proceedings had occurred previously. Actually very little had occurred previously. Hamilton filed an answer to MBI's third party complaint. In that answer, which denied most of MBI's material allegations, Hamilton set out four affirmative defenses:

(1) MBI has no right of indemnity from Hamilton;

(2) MBI failed to state a claim upon which relief could be granted;

(3) Statute of limitations;

(4) Lack of jurisdiction.

As is obvious, there is nothing in any way approaching finality in this case. There has been absolutely no determination on MBI's major claim to say nothing of three of Hamilton's four affirmative defenses. Moreover, even as to Hamilton's fourth affirmative defense, jurisdiction, this was only reviewed as a summary judgment.

As is clearly evident by this point, this case is not ripe for review by this court.

II. The Decision in Question Herein Conforms to a Multitude of State and Federal Court Decisions and Is in Accord With the Decisions of This Court

Hamilton's muted outrage at having been brought to the bar of justice to answer for its tort would be more credible if the year were 1874, not 1974. Essentially, Hamilton's position is that while it ships its products into 15 different states, and while it knows that its products are reshipped by its customers into all states, it is immune to suit for the harm its products cause save in those 15 states. We have been unable to locate any authority to support such a position.

Now, this court has expressly indicated that a review on writ of certiorari is a matter of sound judicial discretion which will be exercised only when there are special and important reasons therefor. Specifically, the court has indicated that it would look with interest where a state court has decided a federal question of substance not heretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this

court. Hamilton's argument fails utterly to demonstrate any such situation herein.

Basically, the factual situation is this. Hamilton sold its Kraft paper to many customers including MBI. Hamilton knew that many of its customers, including MBI, used the product or sold it to their own customers. Specifically, as to MBI, Hamilton was aware that MBI resold its products using Hamilton's products in all of the states of the Union. Specifically, Kraft paper sold to MBI in 1966 was used in Pierce County, Washington where it caused substantial damage.

What Hamilton did herein was to knowingly put its product into the stream of interstate commerce. It took advantage of this vast market to increase its sales. It was not selling to the guy down the street or around the corner. It was selling to customers which it knew sold in all states.

What occurred herein was not particularly novel or innovative. The result was in accordance with a line of Washington cases, *Deutsch v. West Coast Manufacturing Co.*, 80 Wn.2d 707, 497 P.2d 1311 (1972), *cert. den'd*, 409 U.S. 1009; *Omstead v. Braden Heaters, Inc.*, 80 Wn.2d 720, 497 P.2d 1310 (1972); *Golden Gate Hop Ranch, Inc. v. Velsico Chemical Co.*, 66 Wn.2d 469, 403 P.2d 351 (1965); as well as numerous federal decisions: *Benn v. Linden Crane Co.*, 326 Fed. Supp. 995 (E. D. Pa. 1971); *Gorso v. Bell Equipment Corp.*, 330 Fed. Supp. 934 (W. D. Pa. 1971); *Scafati v. Bayerische Motoren Werke A. G.*, 53 F.R.D. 256 (W. D. Pa. 1971); *Blum v. Kawaguchi Ltd.*, 331 Fed. Supp. 216 (D. Neb. 1971); *Liberty Mutual Ins. Co. v. American Pecco Corp.*, 334 Fed. Supp. 522 (D. D.C. 1971).

The rationale for holding a manufacturer, who uses interstate commerce, amenable to suit in the jurisdiction where he causes harm has been noted by several courts.

> A shipment of goods indicates a conscious placement of those goods into the stream of commerce. Obviously, if a manufacturer sells its products directly to the ultimate consumer, the movement of those goods pursuant to the sale would be a direct shipment. However, economic and business reasons dictate that goods will pass through any number of people in a distributive chain before they reach the ultimate consumer. It is the movement of goods through this distributive chain that in this case constitutes an 'indirect shipment'.
>
> *Benn v. Linden Crane*, 326 Fed. Supp. 995, 997 (E.D. Pa. 1971).
>
> When a manufacturer voluntarily chooses to sell his product in a way in which it will be resold from dealer to dealer, transferred from hand to hand and transported from state to state, he cannot reasonably claim that he is suprised at being held to answer in any state for the damage that the product causes.
>
> • • •
>
> Where a defendant does business of such volume or with such a pattern of product distribution, that he should reasonably anticipate that his product may be ultimately used in any state, he has done the act required for the exercise of jurisdiction by the state where the injured user resides.
>
> *Keckler v. Brookwood Country Club*, 248 Fed. Supp. 645 (N. D. Ill. 1965).
>
> The connecting link may consist of . . . the start of a commercial process outside the forum state on the assumption that the article will be sold, used or acted upon or within many other states but with no particular jurisdiction in actual contemplation. . . . The existence of [this] phenomena of modern economy [is] ordinarily enough to bring the parties within the long

> arm statute without engendering an unjust or oppressive extension of jurisdiction.
>
> *Griffiths & Sprague Stevedoring Co. v. Bailey, Martin & Fay, Inc.*, 71 Wn.2d 679, 430 P.2d 600 (1967).

The foregoing cases, which represent only a small number of the many, did not evolve on their own. Instead, they represent a studied effort by the courts to avoid imposing frozen ideas of due process while all of society, including manufacturing, marketing and distribution, undergo a technological revolution. The guidance for their efforts has come from this court. We find in *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945):

> But now that the capias ad respondendum has given way to personal service or summons or other form of notice, due process requires only that in order to subject the defendant to a judgment in personum, if he be not present within the territory of the forum, he has certain minimum contacts with its such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'

In the instant case, the minimum contacts with the State of Washington are inferred from the fact that Hamilton did knowingly place its product into the stream of interstate commerce with actual knowledge that it would go to all states.

In *Hanson v. Denckla*, 357 U.S. 235, 251 (1958) we may note this awareness of the situation:

> As technological progress has increased the flow of commerce between the states, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements for personal jurisdiction over non-residents have evolved from the rigid

> rule of *Pennoyer v. Neff*, 95 U.S. 714, 24 L. ed. 565, to the flexible standard of *International Shoe Co. v. Washington*. . . .

Mr. Justice Black's dissent in *Hanson* echoed this situation:

> That landmark case [*Pennoyer*] was decided in 1878, at a time when business affairs were predominantly local in nature and travel between states was difficult, costly and sometimes even dangerous. There the court laid down the broad principle that a state could not subject non-residents to the jurisdiction of its courts unless they were served with process within its boundaries or voluntarily appeared, except to the extent they had property in the state. But as the years have passed the constantly increasing ease and rapidity of communication and the tremendous growth of interstate business activity have led to a steady and inevitable relaxation of the strict limits on state jurisdiction announced in that case. In the course of this evolution the old jurisdictional landmarks have been left far behind so that in many instances states may now properly exercise jurisdiction over non-residents not amenable to service within their borders. Yet further relaxation seems certain.

10

CONCLUSION

The days when a manufacturer could sit back in his home state and wait for injured parties to track him down are gone forever. When a manufacturer puts an item into the stream of interstate commerce he must be prepared to defend his product wherever it may cause injury.

Hamilton knowingly placed its product into the broad stream of interstate commerce and it ended up in Pierce County, Washington. Therein it did do substantial damage. Hamilton should and must be required to appear, defend and be subject to judgment in Pierce County, Washington.

For the reasons set forth here above the petition for writ of certiorari should be denied.

Respectfully submitted,

WILLIAM R. HICKMAN of
REED, MCCLURE, MOCERI
& THONN, P.S.
Counsel for Respondent
Metal Buildings Insulation, Inc.

JAN 28
MICHAEL RODAK, J

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1059

HAMILTON MANUFACTURING COMPANY,
Petitioner,

v.

METAL BUILDINGS INSULATION, INC.
Respondent.

REPLY BRIEF OF PETITIONER

HAROLD E. WINTHER of
COMBS & SMALL
Of Counsel

923 South K Street
P.O. Box 5126
Tacoma, Washington 98405
Telephone: (206) 383-5861

ROBERT P. PIPER
2600 Seattle-First National
Bank Building
Seattle, Washington 98154
Counsel for Petitioner

CRAFTSMAN & MET PRESS SEATTLE, WASHINGTON

INDEX

Page

Reply of Petitioner to Argument Proffered On Behalf of Respondent Opposing Petition for Writ of Certiorari 1

I. The Only Question Subject to Review by Writ of Certiorari Has Been Finally Adjudicated by The Highest Court of the State of Washington, Thus Invoking the Supreme Court's Jurisdictional Power to Entertain the Merits of Such Petition.... 1

II. Within the Constitutional Framework, the Assumption of *in Personam* Jurisdiction Over Petitioner by the Courts of the State of Washington Would Offend "Traditional Notions of Fair Play and Substantial Justice" 3

Conclusion 5

TABLES OF AUTHORITY

Table of Cases

Betts v. Brady, 316 U.S. 455 (1942)..... 2

Cumberland Coal Co. v. Board of Revision of Tax Assessments, 284 U.S. 23 (1931)..... 3

Hanson v. Denckla, 357 U.S. 235 (1958)..... 4

International Shoe Co. v. Washington, 326 U.S. 310 (1945)..... 4

Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry, 371 U.S. 542 (1963)..... 2

Seaboard Airline Railroad Co. v. Daniel, 333 U.S. 118 (1948)..... 2

Statutes

28 U.S.C. § 1257 2

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1059

HAMILTON MANUFACTURING COMPANY,
Petitioner,

v.

METAL BUILDINGS INSULATION, INC.
Respondent.

REPLY BRIEF OF PETITIONER

REPLY OF PETITIONER TO ARGUMENT PROFFERED ON BEHALF OF RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

I. The Only Question Subject to Review by Writ of Certiorari Has Been Finally Adjudicated by the Highest Court of the State of Washington, Thus Invoking the Supreme Court's Jurisdictional Power to Entertain the Merits of Such Petition

Respecting the dispute between Hamilton Manufacturing Company [hereinafter referred to as "Petitioner"] and Metal Buildings Insulation, Inc., [hereinafter referred to as "Respondent"], the only matter of any constitutional significance, namely jurisdiction, was put to rest by the Supreme Court of the State of Washington on October 9, 1973.

See Petition, Appendix C. Indemnity and the detail of Respondent's products liability claim is of no instant moment. Though the several quotations proffered, all couched in rather broad and general language, doubtless would be relevant under proper circumstances, Respondent's preoccupation with non-jurisdictional issues not only is premature but wholly without this Court's concern, whatever the timing. The United States Supreme Court may, on appeal from a state court judgment, consider whether such court had jurisdiction even where the assumption thereof has not been challenged. *Seaboard Airline Railroad Co. v. Daniel*, 333 U.S. 118 (1948). And in *Local No. 438 Construction & General Laborers' Union, AFL-CIO v. Curry*, 371 U.S. 542 (1963), a determination by the state's highest court respecting a lower court's competence to issue a temporary injunction was held to be "final" within the meaning of 28 U.S.C. §1257. The Court held, at 550:

> "The policy of 28 U.S.C §1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments does not prohibit our holding the decision of the Georgia Supreme Court to be a final judgment, particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts."

The injection of three rather inconsequential affirmative defenses and the more substantive aspect of the controversy suggests merely of Respondent's inability to separate the wheat from the chaff. Jurisdiction, the sole matter of federal review, is no longer susceptible to the scrutiny of the Washington court. In principle, the instant petition falls squarely within the pronouncement of *Betts v. Brady*, 316 U.S. 455, 461 (1942):

> "Since Judge Bond's order was a final disposition by the highest court of Maryland in which a judgment could be had *of the issue joined on the instant petition* we have jurisdiction to review it." (Emphasis added.)

Similarly, in *Cumberland Coal Co. v. Board of Revision of Tax Assessments*, 284 U.S. 23, 24 (1931), the Court observed:

> "The specific contention that the plan of assessment violated the equal protection clause of the 14th Amendment was presented by petition for reargument and was considered and was explicitly overruled by the Supreme Court. As the state court entertained and decided the Federal question, this Court has jurisdiction."

Respondent's desire for finality rather ignores the limits of the petition, the essence of which is the very competence of the Washington courts to hear and decide the basic dispute between the parties. Notwithstanding the seeming dichotomy, the relevant aspect of the case is indeed ripe for review.

II. Within the Constitutional Framework, the Assumption of *in Personam* Jurisdiction Over Petitioner by the Courts of the State of Washington Would Offend "Traditional Notions of Fair Play and Substantial Justice"

Albeit unwittingly, Respondent discerns from the record a rather curious view of Petitioner's position. Nowhere does it appear that Petitioner, in 1966, when the allegedly defective product was sold, shipped items of its manufacture into fifteen different states with knowledge that the same, in an untampered condition, would eventually wind up in each of the United States. In fact, all dealings between Petitioner and Respondent occurred within the borders of

Ohio and Virginia. The "stream of interstate commerce" and "vast market" bespoken exemplify Respondent's 1966 engagement, not Petitioner's.

The mass of authority cited, without exception, simply does not extend to the instant circumstances either because at least minimal contact between the non-resident and forum state was founded or the non-resident was domiciled without the United States. Notwithstanding the lower courts' concerted effort to avoid "imposing frozen ideas of due process," the suggested guidelines of Supreme Court origin are illusory. The carefully screened excerpts from *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), and *Hanson v. Denckla*, 357 U.S. 235 (1958), epitomize the broad and general. Actually or inferentially, Petitioner has had no contacts, ties, or relations with the state of Washington. Invocation of jurisdiction, within the due process criteria of *International Shoe Co. v. Washington, supra*, thus becomes immediately suspect:

> "*That clause [due process] does not contemplate that a state may make binding a judgment* in personam *against an individual or corporate defendant with which the state has no contacts, ties, or relations.*" (Emphasis added.) 326 U.S. at 319

Interestingly, the introductory passage from *Hanson v. Denckla, supra*, appearing in Respondent's Brief (at 17), culminates with the following:

> "*The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state . . . [I]t is essential in each case that there be some act by which the defendant purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. . . .*" (Emphasis added.) 357 U.S. at 253.

CONCLUSION

Allowance of the Washington courts to assume *in personam* jurisdiction over Petitioner would, under the circumstances, not only offend "traditional notions of fair play and substantial justice," but would virtually obliterate whatever significance imparts from the underlying term — "jurisdiction".

Respectfully submitted,

ROBERT P. PIPER
Counsel for Petitioner

HAROLD E. WINTHER of
COMBS & SMALL
Of Counsel